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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. KENNETH WAYNE HILL, Defendant and Appellant.	C083562 (Super. Ct. No. 15F06592)

In 2016, a jury found defendant Kenneth Wayne Hill guilty of murder and attempted murder while personally using a knife, and inflicting great bodily injury in the course of the attempted murder. It subsequently found defendant was not insane at the time of the offenses. The trial court sentenced defendant to 25 years to life plus 14 years in state prison. Defendant completed his briefing on appeal in late September 2018.

Defendant argues the trial court should have suspended trial proceedings because there were grounds at several points to believe he was not competent to participate, there

is insufficient evidence to support the jury's finding that he was sane, it was improper to admit the testimony of a rebuttal witness during the sanity phase, and a pattern sanity instruction is flawed. We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Given the nature of defendant's claims on appeal, the circumstances underlying his offenses are largely irrelevant other than for context. We will incorporate other facts necessary to his arguments in the Discussion.

Police responded to a report of a dead body near a water treatment plant on the Sacramento River in October 2015. The murder victim had a fatal stab wound that severed the carotid artery in his neck. A police officer was familiar with defendant, a homeless person who congregated in the area of nearby service facilities. The officer was asked to speak with defendant about the stabbing (the basis for this directive being the subject of a hearsay objection). During an interrogation, defendant admitted stabbing the victim because the victim exposed his genitals. Defendant perceived this as making sexual advances toward him (defendant claiming antipathy toward what he saw as the "way too gay" nature of the homeless community that was continually harassing him); he had wielded a knife 1,400 times against "cops, bosses, men . . . that try to rape me." He discarded the knife that he used.

A couple of months earlier (Aug. 2015), police had responded to a knife assault in a nearby area. The victim had a wound in his neck. (The victim had extreme language disability related to his mental dysfunctions and could not testify at trial.) Officers soon detained defendant about a block away. (We are not directed to any point in the record explaining how defendant became the focus of the police response.) He had a knife in his possession with blood on it. During an interrogation, defendant asserted that the attempted murder victim would frequently masturbate in front of him. Defendant characterized this as ongoing sexual assault, for which reason—to protect himself from

another sexual assault—defendant stabbed the victim when the victim exposed himself to urinate. (We are not directed to any explanation in the record why defendant was still at large after this prior incident.)

DISCUSSION

1.0 Defendant Fails to Identify Substantial Evidence of His Incompetence at Trial

If a trial court is aware of substantial evidence that gives rise to a doubt about the mental competence of a defendant to understand the nature of the proceedings or to be able to consult effectively with counsel, it is obligated to express this concern on the record, suspend the trial, and initiate a hearing on the issue. (*People v. Lewis* (2008) 43 Cal.4th 415, 524-525 [noting this duty arises under federal due process and Pen. Code, § 1368[1]].) A trial court's express (or in this case implicit) decision not to pursue an inquiry into competence is within its discretion. (*Id*. at p. 525.) There is a distinction between a defendant's irrational ideation and the competence to both understand the proceedings and effectively assist defense counsel. (*People v. Sattiewhite* (2014) 59 Cal.4th 446, 464-465; *People v. Blacksher* (2011) 52 Cal.4th 769, 798 [diagnosis of schizophrenia is not inconsistent with ability to stand trial] (*Blacksher*); see *People v. Welch* (1999) 20 Cal.4th 701, 742 [more required than evidence that a defendant is simply " 'dangerous, psychopathic, or homicidal or such diagnos[e]s' "].)

Defense counsel never expressed any doubt about defendant's competence to stand trial, which is not determinative but is significant. (*People v. Rogers* (2006) 39 Cal.4th 826, 848.) Defendant's argument on appeal conflates the mere fact that there is abundant evidence of defendant's irrational motivations with defendant's ability to understand the proceedings and assist counsel. Defendant does not provide any reference

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1 Undesignated statutory references are to the Penal Code.

to evidence of the latter in the record. We thus truncate defendant's lengthy account of evidence of the former in the three instances he cites as arising at trial.

1.1 *Pretrial Reports*

Because defendant entered a plea of not guilty on grounds of insanity, the trial court appointed two experts to evaluate him (Janice Nakagawa, Ph.D., and Luigi Piciucco, Ph.D). (§ 1027.) They submitted their reports in May 2016. (Trial later commenced in late Sept. 2016.)

Dr. Nakagawa concluded defendant did not have the ability to understand the nature and quality of his acts or the consequences of them, and could not distinguish right from wrong. She found he had genuine paranoid delusions about being the object of gay predators trying to harass and rape him. However, she also described him as oriented to person, place, and time during their interview, giving a cogent claim of self-defense premised on his delusions. Moreover, she found him capable of making a goal-oriented plan of action and executing it even if delusion-fueled.

Dr. Piciucco also noted the ability of defendant to give a detailed account of his crimes and his delusional claim of self-defense to them, and being oriented to person, place, and time. He believed defendant was indifferent to others, lacked empathy, and was easily inflamed by what defendant perceived as the provocations of others. He believed defendant knew the consequences of his criminal acts and had the capacity to distinguish right from wrong. Defendant also had the ability to act purposefully toward a plan of action in furtherance of his delusions.

Defendant focuses on their account of his obsession with being a victim of the sexual interest of multitudes of men as if that of itself precluded his ability to understand his awareness of being the subject of criminal proceedings or communicate effectively in the presentation of his defense. Both reports make plain that regardless of the irrational basis, defendant was capable of planning a defense and communicating it; it may be

pretzel logic on defendant's part, but it is the product of logic nonetheless. Furthermore, nothing in these reports would give rise to a concern four months later that defendant's competence would be any different. As a result, a reasonable jurist would not have *any* reason to believe at the start of trial that there was a doubt about defendant's competence to stand trial based on these reports.

1.2 *Pretrial Interviews Admitted Into Evidence*

Defendant next cites the contents of his three police interviews in 2015 admitted in evidence at trial. Once again, the temporal disconnect between the interviews and the trial makes this stale evidence in the face of the trial court's ability to assess defendant's competence *at* trial, particularly in the absence of any expressed qualms from defense counsel as to defendant's competence. Once again, defendant's briefing focuses on the undisputed *irrationality* of his mindset, which is irrelevant to the issue of whether he was *competent* at the time of trial.

Nothing in these interviews shows that defendant was unaware of the nature of the proceedings against him or could not present an account of the facts of his offenses as *he* perceived them. Simply because appellate counsel believes that the videos of these interviews demonstrate someone who is unfocused does not mean that the trial court should have had a doubt about whether defense counsel would be unable to strategize with defendant and keep him on topic in presenting the unfounded claim of self-defense. In a brief aside, defendant also alludes to evidence that he "had stabbed his stepfather [actually, his mother's boyfriend] several years earlier . . . , based on a similar delusional scheme [in which] the stepfather supposedly flash[ed] his penis." We do not see how this adds anything to the analysis of defendant's awareness of the proceedings and his ability to communicate effectively with counsel.

1.3 *Sanity Phase Evidence*

Finally, defendant cites the testimony of his psychiatric expert (Dr. Nakagawa) during the sanity phase of trial regarding her opinion of his mental illness and sanity. Defendant does not identify anything in her testimony that adds to her pretrial report with respect to *competence to stand trial* as opposed to culpability with regard to legal insanity. As a result, we do not find this to be substantial evidence of incompetence for the same reason.

Defendant also raises a straw issue about the irrelevance of the testimony of the prosecution's rebuttal sanity witness, Tricia Roberts, M.D., in weighing substantial evidence of incompetence. As we *otherwise* do not find substantial evidence in support of a finding of incompetence, we do not need to address whether this witness's testimony was insufficient to oppose this nonexistent evidence of incompetence.

2.0 There Was Substantial Evidence of Legal Sanity

This court has seen its share of deeply disturbed defendants nonetheless found legally sane with respect to their heinous acts. (*People v. Marsh* (2018) 20 Cal.App.5th 694 (*Marsh*); *People v. Bobo* (1990) 229 Cal.App.3d 1417 (*Bobo*); see *People v. Jones* (1997) 15 Cal.4th 119, 179-180 [discussing prosecution reference to the " 'Sacramento Vampire Killer,' " who was found sane after trial and died pending appeal of his death sentence (*People v. Chase* (Feb. 13, 1981, S004291) [appeal abated])].) Mental illness and legal insanity are distinct concepts. (*People v. Mills* (2012) 55 Cal.4th 663, 672 (*Mills*).)

Although the drafting error persists a generation later, as construed in *People v. Horn* (1984) 158 Cal.App.3d 1014, 1026-1027 (*Horn*), section 25 prescribes a test for insanity under which a defendant *either* does not comprehend the nature of the criminal act *or* cannot distinguish right from wrong (the express " 'and' " in the statute needing to be construed as an " 'or' " in order to avoid an interpretation that would apply only to a

"drooling idiot" (*Horn*, at p. 1032); accord, *Marsh*, *supra*, 20 Cal.App.5th at p. 696, fn. 1.) The defendant bears the burden of proof of refuting the presumption of legal sanity. (*Mills*, *supra*, 55 Cal.4th at p. 672.) We may overturn a jury's finding of legal insanity only where it would be unreasonable to reject the evidence to the contrary. (*People v. McCarrick* (2016) 6 Cal.App.5th 227, 247-248 (*McCarrick*).) Even uncontradicted expert testimony is not binding on a jury, if its factual basis and its reasoning are wanting. (*Id*. at p. 247; cf. *In re R.V.* (2015) 61 Cal.4th 181, 200-201 [prosecution does not have *any* burden to produce evidence in support of competence; query is whether jury could not reasonably reject expert evidence of *incompetence*].)

Defendant points out that his psychological expert premised her finding of legal insanity on the undisputed lengthy history of what she felt was defendant's genuine mental illness of an entrenched preoccupation with being the object of sexual predation (regardless of the topic of conversation) unrelated to any voices he might be hearing, including observations of others that were contemporaneous with his offenses. We ultimately do not need to rehash the account of this evidence in defendant's brief, because notably absent from defendant's analysis are citations to *any* facts underlying the expert's opinion that would support a conclusion he was unaware that the act of sticking a knife into the neck of another person could be fatal, or that he was unaware this was wrong even under his deviant belief in the need for self-defense.[2]

As we noted above, even Dr. Nakagawa had agreed before trial that defendant was nonetheless oriented as to person, place, and time, and also capable of making a goal-oriented plan of action and executing it even if delusion-fueled. She never claimed that

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[2] Indeed, Dr. Nakagawa stated defendant was clearly aware that other individuals would be injured as a result of the stabbings he intended, founded on his irrational ideation under which they were justified. Moreover, he embellished his account to her with a claim that the murder victim had raped him in the past and was *wielding* a razor blade at the time of the attack (contrary to what he told police).

he was unaware of the deadly nature of his actions. She simply came to the conclusion that he could not distinguish right from wrong because he was fixated on his irrational belief in the need to exercise self-defense against rape from a universe of gay predators (also conceding that defendant was aggressive and easily irritated for undetermined reasons). This is simply a situation, as we noted in *Bobo* with respect to finding that instructions on voluntary manslaughter were not warranted, in which the "*motive* for the killing was bizarre and delusional" but the defendant "clearly intended to kill without a [valid] . . . justification[] or excuse." (*Bobo, supra*, 229 Cal.App.3d at p. 1443, italics added.) This is *not* evidence that unwaveringly supports a conclusion that defendant otherwise did not understand that he was wrong to commit homicide and attempted homicide.

The jury otherwise had evidence to counter the expert's opinion (in addition to the presumption that defendant knew the nature of his act and whether it was right or wrong). Defendant had told the police that he carried a knife for self-defense and previously used it toward that end, and he was aware from past incidents that use of the knife resulted in harm to another person (expressing remorse for a stabbing of his mother's boyfriend). As for consciousness that his act was wrong, he threw away the knife after leaving the scene of the murder (later telling police that he would not be found guilty because they could not find a knife), and returned to his camp. He was not concerned about other people being present during the killing because he knew that they could not perceive what he was doing. About an hour later, he went back to the scene of the murder but left after seeing police and responders present. In one of his prior stabbings, he had made sure the victim was in an isolated area of the shelter before stabbing him with scissors. In short, this is evidence indicating that regardless of defendant's asserted need to defend himself, he nonetheless recognized his attacks are contrary to norms.

Finally, defendant's arguments with respect to the substance of the sanity rebuttal witness are again immaterial, for which reason we may omit these facts in this context. It was his burden to defease the presumption of sanity. Even if *other* prosecution evidence of sanity in opposition had defects, that does not diminish his own burden of proof.

3.0 The Rebuttal Sanity-phase Witness Did Not Violate Defendant's Rights

This is the quintessential tempest in a teapot. In the course of her testimony, Dr. Nakagawa did not have any specific recollection of a 2014 evaluation of defendant that she noted involved a competency determination for another trial,[3] and she also offered the opinion that she did not think he suffered from personality disorder. After reviewing the 2014 evaluation, she acknowledged that it noted malingering with respect to auditory hallucinations and a diagnosis of personality disorder. The prosecutor then called as a witness Dr. Roberts, who had been a first-year resident in psychiatry when she evaluated defendant in September 2014 at the county medical facility on referral from the county jail for assessment of competence in an unspecified proceeding. She believed he was malingering in his reports of auditory hallucinations of an unspecified psychotic nature, and he had an antisocial personality disorder (i.e., a total disregard for the rights of other people). She concluded he was then competent to stand trial, but did not offer any opinion about his present competence. She noted that defendant did report to her that he believed he was the object of gay predation.

The court allowed the rebuttal testimony specifically for the purpose of admitting the contents of the 2014 evaluation that Dr. Nakagawa had considered. Defendant did not object to this testimony on the basis of his privilege against self-incrimination; he sought only to preclude any opinion with respect to competence.

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[3] Defendant's probation report notes an April 2015 misdemeanor conviction.

Defendant contends on appeal at length that this rebuttal testimony violated his privilege against self-incrimination and asserts that he had to waive this privilege personally. Assuming the privilege against self-incrimination is indeed implicated on the facts of this case, *Blacksher*, *supra*, 52 Cal.4th at pages 822 to 823 flatly states that *counsel's* failure to raise an objection on this basis forfeits the issue on appeal. Defendant contends the case is wrong. He may make that argument to the Supreme Court; we are obligated to follow the holding.

In any event, we are convinced beyond a reasonable doubt that this rebuttal testimony did not prejudicially tread on defendant's privilege against self-incrimination. It did not allude to any *statements* on defendant's part other than hearing voices, and auditory hallucinations were expressly excluded from the basis of the opinion of Dr. Nakagawa (and were also eschewed by defendant as a reason for his actions). Nor did the rebuttal witness offer any opinion on *sanity*. Moreover, her testimony corroborated the long-standing nature of defendant's delusion. We therefore reject his argument.

4.0 The Pattern Sanity Instruction Is Not Infirm

Defendant contends the pattern instruction does not properly convey the latter branch of the statutory test for insanity because it provides that a defendant must be found to be incapable of understanding that the criminal act is morally *or* legally wrong. (See *McCarrick*, *supra*, 6 Cal.App.5th at p. 250.) In defendant's view, a reasonable juror would be reasonably likely to interpret this (*Boyde v. California* (1990) 494 U.S. 370, 378, 380 [108 L.Ed.2d 316]; *People v. Williams* (2013) 56 Cal.4th 630, 688) as requiring a finding that he lacked the ability to discern both morally *and* legally that the act was wrong, which is beyond the statutory definition (*People v. Skinner* (1985) 39 Cal.3d 765, 783 ["a defendant who is incapable of understanding that [an] act is morally wrong is not criminally liable merely because [of an awareness that] the act is unlawful"]).

However, "defendant offers no basis other than speculation that the jury [in fact] adopted this strained reading of the instruction." (*McCarrick, supra*, 6 Cal.App.5th at p. 251.) It does not advance his argument that *Horn*, in the context of *statutory interpretation* (or other secondary authorities), champions this *possible* ambiguity in the interpretation of the use of " 'or.' " (*Horn, supra*, 158 Cal.App.3d at pp. 1027-1028.) He does not point to any argument of counsel that would lead to such an interpretation in deliberations. Indeed, he concedes the prosecutor argued he had an awareness of both components and defense counsel argued he was not aware of either. We therefore reject this challenge to the pattern instruction on the basis of *McCarrick*, which has not to date been the object of any criticism on this point.

DISPOSITION

The judgment is affirmed.

BUTZ, Acting P. J.

We concur:

MAURO, J.

DUARTE, J.